

1. **1410819 (Migration) [2015] AATA 3206 (21 July 2015)**
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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Jaswinder Kaur Mr Gurdeep Singh
CASE NUMBER:	1410819
DIBP REFERENCE(S):	BCC2014/747315
MEMBER:	George Haddad
DATE:	21 July 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicants Student (Temporary) (Class TU) visas.

Statement made on 21 July 2015 at 11:09am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 May 2014 to refuse to grant the applicants Student (Temporary) (Class TU) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 14 March 2014. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.572.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because she did not meet Public Interest Criterion (PIC) 4020 of Schedule 4 to the Regulations..
6. The applicant appeared before the Tribunal on 12 May 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
7. The applicants were represented in relation to the review by their registered migration agent.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.572.224 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
10. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

11. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
12. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The applicant provided a copy of the primary decision record with her application for review. The decision record describes the events and evidence which led to the findings relating to PIC 4020 as follows:

The applicant made the application for a Subclass 572 visa on 17 March 2014 and on 9 April 2014 she attached further documents to the online application including evidence of fixed deposits dated 28 March 2014 held in the name of Major Singh (the applicant's father) held with the Punjab and Sind Bank. The documents were referred to the Australian High Commission (AHC) in New Delhi for routine verification. An authorised officer at the bank confirmed to the AHC staff that the account numbers did not exist concluding that the documents were not genuine.

The delegate wrote to the applicant on 28 April 2014 inviting her to comment on the information received from the AHC. The applicant did not respond.

15. In support of her application for review, the applicant did not provide any material or written arguments other than copies of the bio pages and back pages of each of the applicants' passports and the page containing an Australia visa which ceased to be in effect on 15 March 2014.
16. By letter dated 24 April 2015 the applicants were invited to attend a hearing to give evidence and present arguments relating to the issues arising in the review. The letter also invited any additional documents or information they may wish to rely on to be provided prior to the hearing. The Tribunal received a response from the applicant's representative, a registered migration agent, indicating that the applicants will participate in the hearing but no other material or information was provided.
17. On 12 May 2015 the first named applicant appeared to give evidence and present arguments. I discussed with the applicant the issues arising in relation to cl.572.224 and PIC 4020. The applicant responded that her father is not an educated man. He had an emergency, her mother was sick and he withdrew all monies from the accounts. I explained that the enquiry made by the AHC returned a report from the bank that the account numbers

did not exist which means that the accounts did not exist, rather than the money having been deposited and then withdrawn. To this the applicant stated that she does not know. She simply asked her father and he sent those documents, it is not her fault. I asked the applicant why she did not reply to the 'natural justice' letter sent to her by the delegate to comment on the information from the AHC in New Delhi regarding the bank documents. She said she spoke with her lawyer who did not say anything. She said that she has not spoken with her father for a long time and they are not on good terms. He might have sent her the wrong documents, she does not know if he had any money. When she received the letter from the department saying the bank accounts did not exist it ruined her life.

18. The report from the AHC is held on the Department's file. I put the particulars of the information in accordance with s.359AA of the act stating that the bank manager at the branch the accounts were purported to be held advised the AHC that the accounts do not exist. I explained the relevance of the information to the review and that it may lead the Tribunal to find that there is evidence given or caused to be given to the Minister of a bogus document or information that is false or misleading in a material particular in relation to the visa application which may lead the tribunal to find that she does not meet PIC 4020(1) and this would be the reason or part of the reason the Tribunal may affirm the decision under review.
19. I invite the applicant to consider adjourning the review to comment or respond to the information. She stated that she does not wish to adjourn and proceeded to respond to the information stating in summary:

The documents her father provided were correct, and if they were not then her father deceived her. She is not on good terms with her father which may explain the reason he gave her those documents. But he did not tell her that the documents were false. She did not have any money and needed money.
20. I indicated that on the evidence before the Tribunal and having considered all that she wished to say, I will find that PIC 4020(1) is not met.
21. On the basis of the above I am satisfied that there was evidence that the applicant has given, or caused to be given, to the Minister information which was false or misleading in a material particular as defined in cl.4020(5) in relation to the visa application relevant to the financial capacity criterion for the purposes cl.572.223 in making the decision on the visa application. I am satisfied that the information was purposely false.
22. Therefore, the applicant does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) BE WAIVED?

23. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
24. I explained to the applicant the significance of the waiver provision on PIC 4020(4) and invited her to consider putting any material which may be relevant for the consideration of this provision.
25. The applicant said that:

She simply wants this clause to not apply in her case.

She wishes to stay in Australia as she does not have a future in India.

She has no money, no house in India and does not have a good relationship with her father.

She wants to be allowed to stay in Australia. She paid her taxes and is a genuine student. She continued to study after she applied for review but obviously her father has deceived her.

26. I explained to the applicant the prescribed circumstances which may be taken into account under the waiver provision and again invited her to put anything which might assist her case.
27. The applicant repeated earlier evidence that she simply wants to stay in Australia as she does not see a future in India and simply asks the Tribunal to waive the requirement of PIC 4020(1). I indicated that the Tribunal does not have the authority to simply waive the requirement unless it is satisfied the waiver provision of PIC 4020(4) can apply. I informed the applicant that I will affirm the decision under review as it appears that the Tribunal has no alternative.
28. Having considered the applicant's evidence in relation to the waiver provision of PIC 4020(4), the Tribunal is not satisfied that the requirements should be waived.
29. Therefore the requirements of cl.4020(1) should not be waived.
30. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.572.224.
31. In respect of the second-named applicant, there is no evidence or submissions that the second-named applicant meets the primary criteria for a student visa. The tribunal has assessed the second-named applicant against the secondary criteria. One of the requirements at the time of decision is found in cl.572.322 which relevantly provides:

The applicant is a member of the family unit of a person (the **primary person**):

(b) who satisfies, or has satisfied, the primary criteria in Subdivisions 572.21 and

572.22 and who meets one of the following:

...

(iii) the primary person:

(A) will be, or has been, granted a visa in relation to a course of study that is, or to courses of study that are together, of a duration of 12 months or more; or

(B) has been lawfully in Australia for 12 months or more.
32. The second-named applicant is the spouse of the first-named applicant or the 'primary person' as the Tribunal has found that the first-named applicant does not meet cl.572.224, the first named applicant does not satisfy the criteria in Subdivision 572.22. Therefore the second-named applicant does not satisfy cl.572.322.

33. Other relevant subclass of Class YU visa contain similar or mirror requirements. For these reasons the applicants do not satisfy the requirements for the grant of those other subclasses of Class TU visa.

DECISION

34. The Tribunal affirms the decision not to grant the applicants Student (Temporary) (Class TU) visas.

George Haddad
Senior Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...